IN THE

Supreme Court of the United States

October Term, 1979

No. 79-658

DEERING MILLIKEN RESEARCH CORPORATION and MOULINAGE ET RETORDERIE DE CHAVANOZ,

Petitioners,

v.

DUPLAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Deering Milliken Research Corporation ("DMRC") and Moulinage et Retorderie de Chavanoz ("Chavanoz"),* ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit, entered on March 26, 1979.

Opinions Below

The opinion of the Court of Appeals is reported at 594 F.2d 979. The opinion of the District Court for the

* Since the commencement of this litigation, both petitioners have undergone name changes. In the interest of simplicity, we shall use here the names by which they were formerly known and which are used in the record.

District of South Carolina (Dupree, J., sitting by assignment) is reported at 444 F. Supp. 648. Both opinions, together with certain supplementary findings of fact made by the trial court, are reproduced in the Joint Appendix accompanying this petition.

Jurisdiction

A timely petition for rehearing was denied by the Court of Appeals on May 29, 1979. On August 21, 1979, the Chief Justice signed an order extending the time to file this petition to September 26, 1979; on September 21, the Chief Justice signed an order further extending the time to and including October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1332, 1337, 1338, 2201 and 2202.

Questions Presented

This is another of the plethora of contemporary litigations in which one side asserts patent rights and the other responds with accusations of violation of the antitrust laws. Petitioners are on the side of the patents.

The case is extraordinary in its magnitude: 37 separate actions are here consolidated, and the trial—limited to issues of liability—occupied 91 trial days spread over nine months.

But the questions presented by this petition are quite simple.

The trial judge, sitting without a jury, held that all patents in issue were either invalid, or not infringed, or both. The Fourth Circuit affirmed these patent rulings on the opinion below, and we do not now challenge them.

The trial judge held also that petitioners had violated Sections 1 and 2 of the Sherman Act by their previous settlement of other patent litigations. It is only these antitrust rulings, which the Court of Appeals also affirmed on the opinion below, that we now ask this Court to review.

The patent issues accounted for most of the trial time. Proof on the antitrust issues was quite limited and almost entirely documentary; there is no dispute as to the facts.

The antitrust questions presented may be most readily understood if we first identify the parties and furnish a word of background:

Joining in this petition are: (1) a French company (Chavanoz) which holds patents in France, the United States and elsewhere relating to the "false twist" process for imparting elasticity and other desired qualities to synthetic yarns; and (2) an American company (DMRC) to which Chavanoz granted exclusive use rights in the United States under its patents, with the right to sublicense.

Also parties below and also adjudged to have violated the Sherman Act (but filing separate petitions for certiorari) are (1) DMRC's parent, Deering Milliken, Inc. ("DMI"); (2) a French textile machine manufacturer, Ateliers Roannais de Constructions Textiles ("ARCT-France"), which Chavanoz licensed to manufacture and sell machines embodying the Chavanoz patents; and (3) ARCT, Inc., a North Carolina subsidiary of ARCT-France which was organized to be the exclusive distributor of ARCT machines in the United States.

Not a party but equally important is Leesona, Inc., an American manufacturer of competing false twist machines which also holds a number of patents. Like Chavanoz, Leesona divided its patent rights: it manufactured and sold machines, but it required a separate royalty-bearing license

before the customer could lawfully use and operate the machines.*

The 19 parties on the other side are all textile companies engaged in false twisting of synthetic yarns. They are known as "throwsters." At various times beginning in 1960, they bought ARCT machines and obtained licenses from DMRC to use them under the Chavanoz patents. Beginning in 1969, the throwsters stopped paying the production royalties stipulated in the licenses, but continued to use the machines.

These 37 litigations followed—some as actions to collect royalties, others for infringement of the Chavanoz patents, still others as declaratory judgment actions by throwsters. For convenience' sake, the courts below denominated the throwsters "plaintiffs."

The antitrust rulings we now ask this Court to review all arose from a settlement in 1964 of (1) patent litigations in this country in which Leesona charged Chavanoz and its allies with patent infringement, and the Chavanoz side countered with demands for judgment of invalidity and noninfringement of the Leesona patents; and (2) litigations in France in which Chavanoz and Leesona accused each other of infringement and each side sought to invalidate the other's patents and have them adjudged not infringed.

The settlement provided for dismissal of all of these actions, with the parties covenanting not to sue each other or their licensees.

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* The patent laws provide that the patentee shall have "the right to exclude others from making, using or selling" his invention, and a patent "or any interest therein, shall be assignable . . . ." 35 U.S.C. §§ 154, 261. Accordingly, a patentee enjoys the right to grant separate licenses under any of his three statutory rights. *Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175 (1938); *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453 (1873).

As the District Court said, "the facts are not in substantial dispute." (444 F. Supp. at 675, A43.) In issue are only the legal conclusions to be drawn from these undisputed facts.

On four points, we submit, the courts below made important errors of law, significant not only here but across the broad range of antitrust and patent litigation. The errors have two characteristics in common. Each is without precedent in any decision of this Court. And each is a litigation-breeder; unless reversed, they will make settlement of all patent litigation virtually impossible and they will significantly add to the antitrust and patent case burden of the trial and appellate courts.

Accordingly, we urge this Court to grant certiorari to decide these questions:

I.

The courts below ruled that, when DMRC and Chavanoz settled with Leesona without fighting the litigation through to the end, the result was to enable the patents and royalty program of each side to remain in effect—whereas, had they continued the litigation, the result *might* have been invalidation of the patents and an end to the royalty programs. Since the parties necessarily anticipated these possible consequences, the courts below held, their conduct amounted to a form of price-fixing, violative of Section 1 of the Sherman Act, and an exclusion of competition in violation of Section 2.

These rulings raise the question: must parties accused of patent infringement fight on to the end rather than settle, on peril of being adjudged to have violated the Sherman Act, a statute which has criminal as well as civil sanctions?

II.

The District Court held that the fact of injury to plaintiff throwsters—a necessary element of any claim asserted under Section 4 of the Clayton Act—was established by proof that, after the Leesona-Chavanoz/DMRC settlement, the throwsters continued to pay royalties to DMRC. (444 F. Supp. at 687, A72.)

Although the District Court offered no analysis of this holding, it necessarily depends on a number of unarticulated assumptions as to which there is no evidence—the most critical being that, had there been no settlement, the Leesona patents would have been adjudged invalid, in which event DMRC would have been compelled, by considerations of competition, to reduce or eliminate the royalties it was charging on the Chavanoz patents.

The trial court here did not hold the Leesona patents invalid. It did not even consider their validity, nor has any other court ever had a trial and adjudged them invalid.* In consequence, it can be no more than speculation to presume what DMRC's royalty policy *might* have been *if* all of the Leesona patents had been invalidated.

This question is accordingly presented: may such unproven and inherently unprovable speculations establish the *fact* of injury required by Section 4?

* In 1973, a district court granted summary judgment invalidating three Leesona patents, *In re Yarn Processing Patent Validity Litigation,* 360 F. Supp. 74 (S.D. Fla. 1973), but the decision was reversed on appeal on the ground that there were issues of fact requiring trial, 498 F.2d 271 (5th Cir. 1974). The case was thereafter settled with the validity issue undetermined.

We might note also that in early 1964, just before the Leesona-Chavanoz/DMRC settlement, a Canadian court held the Canadian counterparts of these same three Leesona patents valid and infringed by a machine manufactured by a British concern, Scragg. (444 F. Supp. at 680, A55.)

III.

Leesona licensed certain other machinery manufacturers under its false twist patents. The Fifth Circuit has held that these license agreements are per se violations of Sections 1 and 2 of the Sherman Act, *In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (1976), *cert. denied,* 433 U.S. 910 (1977).

DMRC and Chavanoz were not parties to the Fifth Circuit litigation and of course are not bound by that judgment. Nor were they parties to the Leesona license agreements which the Fifth Circuit held unlawful. The legality of the Leesona manufacturing licenses was not an issue in this trial. Nevertheless, the courts below here ruled that DMRC and Chavanoz had violated Sections 1 and 2 of the Sherman Act because, by settling with Leesona, they "facilitated" and aided "conduct . . . held violative of the Sherman Act" in the Fifth Circuit. (444 F. Supp. at 686, A70.)

Does this ruling deprive DMRC and Chavanoz of their rights to due process and a fair trial?

IV.

Although the Leesona-Chavanoz/DMRC settlement was consummated and widely publicized in April 1964, and no plaintiff throwster challenged the settlement until November 1969, the trial court held that the Clayton Act's four-year statute of limitations did not bar the throwsters' claims. The court gave two reasons: (1) each time DMRC collected a production royalty from a throwster, a new cause of action was created, and those within the four-year period preceding assertion were not time-barred; (2) had the throwsters sued within four years of the settlement, they could not have proven their "future damages" accurately

because the false twist industry was undergoing "uncertainties" and "enormous growth and change." (444 F. Supp. at 693, A84-85.)

These rulings present two questions:

(A) Assuming that the Sherman Act is violated by the settlement of patent litigation which permits each side to continue a royalty program previously in effect, does the statute of limitations run from the settlement, or is a new cause of action created every time a royalty payment is made?

(B) Is the statute of limitations tolled because plaintiffs, had they sued within the statutory period, would have had difficulty in proving their "future damages"?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 15b of the Clayton Act, 15 U.S.C. § 15b, provides in pertinent part:

> "Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

Statement of the Case

The facts giving rise to the antitrust issues here are quite simple.

In 1954, Leesona began selling and licensing false twist equipment in the United States. For several years, it had the market all to itself. (444 F. Supp. at 675, A44; A351.) In 1957, it obtained three patents, broad enough to cover virtually any false twist machine. (*Id.*; A349.)

During the early '50s, Chavanoz was developing its own false twist machines; it obtained its first French patent in 1953, and additional patents in the ensuing years. Chavanoz filed counterpart applications in the United States and elsewhere.

In 1957, Chavanoz decided to challenge Leesona's monopoly of the American market. Chavanoz had earlier licensed ARCT-France to manufacture and sell machines under the

Chavanoz patents; now it engaged DMRC to license use rights in the United States, and agreed to share the royalties with DMRC. It was arranged also that Whitin Machine Works, a Rhode Island machinery manufacturer, would sell ARCT machines in the United States. (444 F. Supp. at 661-64, A11-19.)

Chavanoz, DMRC and Whitin knew that they faced war with Leesona, for Leesona was vigorously asserting its patent rights; in 1957 and 1958, Leesona brought four separate infringement actions. (A351-53.)

The threat was not long in materializing. On April 1, 1960, shortly after shipments of ARCT machines into the United States began, Leesona sued users of these machines for infringement. Whitin—financed by Chavanoz and DMRC—brought a countersuit for a judgment declaring the Leesona patents invalid and not infringed, and the war was on. (A355.)

There followed four years of litigation in the United States and in France, with but occasional settlement efforts. It was only in early 1964, when the Whitin countersuit was on the very eve of trial, that settlement was accomplished. The settlement was of limited reach. Each side was left free to develop new machines and new patents—the settlement provided only that they would not sue each other, or their licensees, for infringement by *existing* machine models nor for infringement of certain specified patents. And DMRC would pay Leesona a maximum of $150,000 out of future royalties collected by DMRC. (444 F. Supp. at 680-81, A56-57.)

Thus the Leesona patent monopoly was broken and the Chavanoz entry into the American market was secured—ARCT machines could be freely sold and used in competition with Leesona's. By 1969, ARCT machines accounted

for an estimated 20% of all false twist machines in place in the United States.

Such is the factual background of the current litigation, which began in late 1968 when DMRC sued a throwster for unpaid royalties. Non-payment by throwsters proved contagious and other suits followed, for royalties and for patent infringement. Contemporary patent litigation is clearly incomplete without antitrust defenses and counterclaims, and so in November 1969, for the first time, counsel for a throwster raised a claim that the 1964 settlement was the product of a "conspiracy."

Reasons for Granting the Writ

The significance of the questions here presented will best appear, we believe, if we discuss them separately.

I.

Was the 1964 Settlement Wrongful?

As we have seen, the 1964 settlement accomplished for Chavanoz, DMRC and ARCT what they had sought to achieve when they first decided to bring ARCT machines into the American market; *i.e.,* the settlement left them free to sell ARCT machines and license the Chavanoz patents on such terms as the market would permit. And Leesona was left equally free, in the United States and abroad.

The trial court, with the concurrence of the Court of Appeals, held this settlement unlawful because its "dominant purpose . . . was anti-competitive, that purpose being to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation *might* well have destroyed." (444 F. Supp. at 682, A59; emphasis added.)

This ruling presents a simple question of law, for the stated facts are not in dispute:

1) The royalty programs of Leesona and DMRC/Chavanoz *were* interdependent to some degree at least—when two makes of machinery are competing in the market, any royalties charged to operate the machines will be competitively interdependent just as will the prices charged to purchase the machines.

2) Of course Chavanoz and DMRC wanted to preserve their royalty program, and they necessarily recognized that their program could be destroyed (or at least prejudiced) *if the litigation ended in any way but settlement.* For if the litigation resulted in the Leesona patents being held valid and infringed by the ARCT machines, Leesona would have the power either (a) to forbid operation of the ARCT machines, or (b) to impose royalties for operation so high as to prejudice or preclude the collection of royalties by DMRC and Chavanoz as a competitive matter. On the other hand, if Chavanoz and DMRC *won* the litigation and the Leesona patents were held invalid, Leesona would no longer be able to collect royalties for operation of its machines and Chavanoz and DMRC would again be hurt, since the royalty programs were competitively interdependent. Only if the litigation ended in a judgment that the Leesona patents were valid *but not infringed* by the ARCT machines could the Chavanoz/DMRC royalty program continue unaffected. But that result could not reasonably be expected, for patent counsel had advised Chavanoz and DMRC that the Leesona patents clearly covered the ARCT machines.

Thus, only by settling in the way they did could Chavanoz and DMRC preserve their royalty program. We agree that they realized this—there is no question that is the principal reason why they settled. Nor is there any question that they realized also that the settlement would result in the Leesona royalty program continuing—at least until someone else successfully challenged the Leesona patents.

And they must also have recognized, we submit, that the settlement had one clearly *pro*-competitive effect: it guaranteed that ARCT machines could continue to be sold in the United States, that the Leesona monopoly would not be restored.

The only question is: is it a violation of the Sherman Act to settle patent litigation when such consequences must be anticipated?

We submit that the only possible answer to this question is in the negative.

For present purposes, however, it is enough to say that this question deserves an answer by this Court. For if this question is not answered, and answered in the negative, then the rulings below will make the settlement of all patent litigations virtually impossible. We refer not only to the unusual litigation where the parties have competing patented techniques; the analysis employed here by the courts below will make settlement unlikely even of the everyday patent suit, where a patentee sues an infringer.

The standard settlement of such a litigation, of course, is for the accused infringer to take a license (on terms more or less favorable, depending on the bargaining power of the parties), and to acknowledge validity and infringement of the patent. Every accused infringer who contemplates signing such a settlement must realize, as did Chavanoz and DMRC, that the necessary result of settlement will be to "preserve and enhance" the patent and the patentee's royalty program—a result which is surely "anti-competitive" when compared with the situation which might have

resulted if the infringer had continued the litigation and invalidated the patent.

Reading the decision below, we submit, no person charged with infringement will feel able to settle—not when the consequence is likely to be an antitrust suit charging him with having violated the Sherman Act because he failed to fight on.

Two results are likely, neither of them attractive. First, our already-burdened trial courts will have the burden of additional trials cast upon them. According to the Annual Reports of the Federal Judicial Center, of the patent cases terminated in the fiscal years 1972-78, about 88% were settled before trial, an average of 751 annually.* Since the decision below would seem inevitably to deter settlement, the result will be an increased load on our trial courts.

An alternative but no more appealing result of the decisions below will be the deterrence of suits which challenge patents. A prospective challenger will think at least twice about filing suit, we suggest, if he knows that the suit can not be settled and must be fought to the end—either of the litigation or the litigant's resources. This deterrence is precisely contrary, of course, to the teaching of *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969), that the public interest is served by the filing of suits to invalidate patents.

The Leesona-Chavanoz/DMRC case was not, we appreciate, the everyday patent case; the settlement took place between two competing patentees, and the settlement operated to permit two royalty systems to continue (until the next challenge) rather than one. Also, the Leesona and ARCT machines were at the time the only machines on the American market in significant number.

* See the Annual Reports for fiscal years 1972-78, Tables C-4 and C-2.

But these facts make no difference in the legal analysis. The worst that may be said of the Leesona-Chavanoz/DMRC settlement is that it preserved a legal duopoly, a shared legal monopoly—this surely is no worse than the usual settlement which preserves the patentee's unshared monopoly. And, as we have noted, the settlement had one clearly beneficial effect: it wrote finis to the Leesona absolute monopoly.

Ironically, one of the principal throwster-plaintiffs here is Burlington Industries, Inc., the largest textile company in the world. Burlington now complains that petitioners settled with Leesona. Yet in 1963 Burlington and its subsidiary, Madison, both settled identical litigation with Leesona: they took licenses from Leesona, they paid damages of $265,500 for past infringements, and they even consented to the entry of judgments adjudicating the Leesona patents valid (a step which Chavanoz and DMRC did *not* take). (A359-60.) Burlington must surely have realized—as did Chavanoz and DMRC—that the consequence of settlement would be "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed." (444 F. Supp. at 682, A59.) Why, then, may Burlington sue Chavanoz and DMRC for following Burlington's lead? We do not suggest an *in pari delicto* defense. Rather, we submit that what Burlington lawfully did, DMRC and Chavanoz were also free to do.

The trial court attempted to support its decision by going outside the settlement agreement. It said (444 F. Supp. at 685, A66-67):

> "While on its face the agreement would not seem to offend the antitrust laws, when considered in the light of the surrounding circumstances and the actions of the parties before and after its execution,

the conclusion is that the agreement was anti-competitive and a restraint on interstate commerce in violation of Section 1 of the Sherman Act."

But the "circumstances" and the "actions" to which the court adverts prove no unlawful anti-competitive conduct.

The court first notes that Leesona and Chavanoz/DMRC both had royalty programs, that their royalty rates were closely comparable for the most popular yarn, and that they knew about each other's rates. (444 F. Supp. at 685-86, A67-68.) Similarity of rates, is, of course, exactly what any economist or judge would expect when two licensed machines are in competition—significantly, there is no charge here that the rates were set as a result of any conspiracy, only that the settlement "stabilized" them at the existing level and permitted them to continue. And of course the parties knew each other's rates and knew that they were "interdependent." That proves no wrongdoing, only consciousness of the basic facts of lawful business life, facts that any settling patent litigant would necessarily recognize.

Next, the court says that DMRC and Chavanoz had the opinion of "highly qualified patent counsel" that the Leesona patents were "weak." (444 F. Supp. at 686, A68.) This is true. But so does every accused infringer defendant have the opinion of his lawyer that justice will be done and the patent will be held invalid—that is why there is litigation. And, we submit, patent litigations may nevertheless be settled lawfully. After all, when Burlington resisted Leesona's suit, it surely had able counsel—the same firm which represents Burlington here. Counsel surely advised Burlington that its position was meritorious—otherwise Burlington would hardly have resisted. Indeed, Burlington also had the very opinion of "highly qualified patent counsel" which the courts below found so damning in the hands

of DMRC and Chavanoz—since DMRC had supplied copies of the opinion to the entire industry. (A356.) Yet Burlington settled and is here the accuser, not the accused.

The court goes on to note that the settlement "amounted in effect to the cross-licensing of the Chavanoz and Leesona patents by the two patent owners who effectively dominated the false twist industry, and this gave them the power to fix and maintain prices in the form of royalties which they consistently exercised thereafter." (444 F. Supp. at 686, A68-69.) This means no more than that the settlement permitted the "interdependent" royalty programs to continue—a point we do not challenge. That was the necessary, inevitable consequence of settlement—and settlement being lawful, this was lawful. Nor does the parties' "dominance" condemn their conduct: they had achieved that dominance by developing machinery never seen before and by obtaining patents in wholly lawful fashion. We have here none of the corrupt behavior of *United States* v. *Singer Mfg. Co.,* 374 U.S. 174 (1963).

The court next says that a "misleading press release was prepared by the parties announcing the settlement to the industry." (444 F. Supp. at 686, A69.) The press release stated that the settlement had followed "close on the heels" of the decision of a Canadian court upholding the Leesona patents. This was true, the trial court here said, but misleading in that "the Canadian court decision was not a motivating factor in the settlement." (444 F. Supp. at 681, A57.) Whether the trial court here is right or wrong makes no difference. We agree that the prime purpose of Chavanoz and DMRC in settling was to avoid the unhappy consequences which either defeat or victory would bring—but settlement for that reason, we submit, is no crime.

Finally, the trial court says, "The conduct of the parties following the settlement showed their cooperation in ad-

hering to the program of fixed and stabilized royalty rates and their cooperation in keeping out competition." (444 F. Supp. at 686, A69.) The court offers three instances of this post-settlement "cooperation." On the undisputed facts it is clear that this charge has not the slightest substance. The totality of the proof was this:

(a) A Whitin vice president wrote to a DMRC officer and referred to "the desirability of indicating to the world at large that the Leesona and Chavanoz patents are strong." (444 F. Supp. at 681, A58.) This letter might prove that Whitin and DMRC recognized an obvious economic fact, but neither the letter nor the recognition was ever communicated to Leesona—there was no "cooperation" (sigficantly, the trial court held that Whitin was not a participant in the "conspiracy," 444 F. Supp. at 690, A79).

(b) A Finnish manufacturer of false twist machines asked DMRC to become its United States representative; DMRC refused (it was, after all, licensing for Chavanoz), and added the gratuitous advice that the validity of the Leesona patents was undisputed and "this would put a very considerable burden upon anyone attempting to introduce another false twist machine in the United States." (444 F. Supp. at 681, A58.) This language may well have been intended by DMRC to discourage the Finns from entering the United States to compete with DMRC—and Leesona as well—but it is no proof of any "cooperation" with Leesona.

(c) Last, Armitage, a DMRC executive, learned that Turbo Machine Company planned to offer a false twist machine; he directed that a study be made to determine if the Turbo machine infringed any Chavanoz or Leesona patent (444 F. Supp. at 681, A58), and a diary entry indicates that he may have called to Leesona's attention the

fact that the Turbo machine infringed the Leesona patents. But nothing happened; no one did anything about Turbo.

There is no substance whatsoever, in consequence, in the trial court's statement that there was any post-settlement "cooperation."

The conclusion follows that there was in the settlement nothing that will not be found in the settlement of every patent case. If the routine settlement is lawful, and it is, then this settlement is lawful.

The trial court's error in ruling the settlement unlawful resulted, we believe, from two erroneous legal propositions which it asserted:

First, the trial court said (444 F. Supp. at 683, A62):

> "Although settlements of patent litigation are normally as desirable as settlements of other types of litigation [citation], settlements of such litigation are not sanctioned by the courts when they are attended by anti-competitive results. *United States* v. *New Wrinkle, Inc.,* 342 U.S. 371 (1952); *United States* v. *Line Material Company,* 333 U.S. 287 (1948); *Standard Oil Company* v. *United States,* 283 U.S. 163 . . . ."

The cited cases stand for no such sweeping proposition. As we have seen, every settlement of a patent litigation which eliminates the possibility of the patent's being invalidated may accurately be said to have "anti-competitive results" in that the patent monopoly is continued. But such "anti-competitive results" have never before been held unlawful —a patent monopoly is, after all, a *lawful* monopoly, granted by the Patent Office exercising power under a statute enacted pursuant to Constitutional authorization.

The trial court also set forth this rather extraordinary legal proposition (444 F. Supp. at 684, A63-64):

> "An inference of conspiracy may be drawn from the fact that competitors maintain parallel pricing structures which are interdependent. *Wall Products Company* v. *National Gypsum Company,* 326 F. Supp. 295 (N.D. Cal. 1971)."

Neither the cited case nor any other of which we are aware so holds. Professor Areeda pointed out the error of such thinking in his classic *Antitrust Analysis* at 218 (1st ed. 1967): "Because of their mutual awareness, oligopolists' decisions may be interdependent although independently arrived at." And Professor Turner stated the limits on the significance of "interdependence" in *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 672 (1962):

> "[M]ere interdependence of basic price decisions is not conspiracy. In these cases [of oligopoly], therefore, something more in the way of 'agreement' must be shown . . . . Parallelism will tend to prove that 'something more' exists only if the other evidence in the case suggests that the hypothesis of lawful oligopoly pricing—noncompetitive prices resulting simply from recognized interdependence—does not account for all the facts. If that hypothesis is equally plausible on the facts, a case should be dismissed for the time-honored reason that a party with the burden of proof cannot be allowed to obtain a verdict or judgment that can be reached only by speculation."

Here, there is "nothing more" than the settlement and the interdependent pricing which is inevitable when two competitors are offering similar goods. That is not enough to warrant either Section 1 or Section 2 liability.

* * *

The ruling of the courts below comes down, we submit, to a ruling that there is an obligation on patent litigants to litigate to the death.

We cannot perceive the rationale of this ruling. Of course it is desirable to have invalid patents invalidated. But it is at least equally desirable that parties *challenge* patents—and challenge must surely be deterred if challenging a patent involves grabbing a bear by the tail.

Nor need there be fear that, because one patent-challenger settles, other challenges will not arise. Even though Chavanoz and DMRC here settled with Leesona, any throwster was free to challenge the Leesona patents. The doctrine of licensee estoppel was no barrier: long before *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969), this Court had made it clear that a licensee asserting antitrust violations was free to dispute the validity of his licensor's patents. *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 387 (1948); *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.,* 329 U.S. 394, 398-9 (1947).

Precisely this situation prevailed here. The plaintiff throwsters were all free, the day after the Leesona-Chavanoz/DMRC settlement, to assert the illegality of the settlement and to contest the Leesona patents and the Chavanoz patents as well.

The throwsters' position comes down, then, to the proposition that Chavanoz and DMRC were saddled with an obligation to continue litigating with Leesona for the benefit of the throwsters.

We ask this Court to deny any such obligation.

Perhaps the ultimate proof of the essential irrationality of the ruling below is the following hypothetical irony. Let us assume that Patentee, in separate actions, sues A and B for infringement. A, advised by distinguished counsel, believes that the patent is invalid and fights the litigation for years. Finally, he decides to settle—proving invalidity is an expensive matter involving lengthy trials, the high fees

of experts and counsel, diversion of his executives from other, more profitable pursuits, and an uncertain outcome. So he settles: he accepts a royalty-free license in exchange for his acknowledgment of the patent's validity. A is content; he has won his freedom from the patent's thrall. WHEREUPON: B brings his case to trial. His pleading of course raises antitrust issues—as do all pleadings in patent infringement cases. B conducts no lengthy litigation, hires no expensive counsel and experts, runs no significant risks. He claims only that Patentee and A have violated the antitrust laws. He need not prove the patent invalid. His claim is only that the patent "might" have been held invalid in A's litigation, if only A had not sold out the cause. If B wins, he receives a treble-damage fortune. If he loses . . . but how can he lose?

II.

Does the Fact that Plaintiffs Paid Royalties to DMRC after the Leesona Settlement Establish the Fact of Injury Required by Section 4?

The courts below ruled that plaintiffs need not prove that they have suffered actual injury as the result of the settlement of patent litigation. It is enough, the courts held, if plaintiffs show that they *might* have saved money *if* there had been no settlement.

This appears clearly from the only language which the trial court devoted to the "fact" of injury (444 F. Supp. at 687, A72):

> "The sizable royalty income collected by DMRC in the years following the settlement affords graphic proof of the impact which the [licensing] program had upon [plaintiffs'] businesses [fn. on annual royalty income received by DMRC, ranging from $1,000 in 1959 to $123,302 in 1964 to $3,329,303 in 1969 to $982,640 in 1972]. The court concludes that as a direct consequence of the violations of Sections 1 and 2 of the Sherman Act by DMRC and Chavanoz the plaintiffs have been injured in their business and property within the purview of 15 U.S.C. § 15."

Thus the court holds that "injury" is proven by the fact that the throwsters continued to pay royalties to DMRC after the 1964 Leesona settlement. To reach this conclusion, the trial court necessarily but silently rested on a chain of assumptions which were not and never could have been proven, among them:

(1) That if the settlement had not taken place, the Chavanoz side would have pressed the litigation through trial, appeal, certiorari petition, etc., winning on all three Leesona patents in suit at all times;

(2) That invalidation of the three Leesona patents in suit would have resulted in Leesona's abandoning its royalty program, even though Leesona had other patents which could have (and did) support a royalty program;

(3) That the elimination of a Leesona royalty program would have necessitated reduction or elimination of the Chavanoz/DMRC royalty program—despite the fact that, as the trial court said, patented ARCT machines were "in great demand in the industry" (444 F. Supp. at 750, A216), and even though Chavanoz continued to introduce and patent new features after the settlement.

There is no way, we submit, for mortal man to do anything but guess as to whether any of these assumed "facts" would have occurred, to what degree, and when, had the settlement not taken place. In any event, there is no *proof*

whatsoever in this record. The courts below referred to none. And it is proof of real injury which Section 4 requires.

We might observe that the alternative hypothesis is surely possible: had the Leesona-Chavanoz/DMRC litigation gone to trial, the Leesona patents might have been adjudged valid and infringed by the ARCT machines. This speculation is by no means unreasonable: the Leesona patents are, of course, presumptively valid; they have never been held invalid; and their counterparts were held valid by the Exchequer Court of Canada, *Ernest Scragg & Sons Ltd.* v. *Leesona Corp.*, [1964] Can. Exch. 649. And even DMRC's "highly qualified" patent counsel had given the opinion that the ARCT machines infringed the Leesona patents. Had this been the outcome of the Leesona-Chavanoz/DMRC litigation, the throwsters would *really* have been hurt, for the absolute Leesona monopoly would have been restored.

We do not suggest that Chavanoz and DMRC deserve an award for saving the throwsters from this "injury." Our point is, rather, that speculation can lead anywhere except to reality.

We ask this Court to rule that the courtroom doors are not open to those who say—but cannot and do not prove—that they *might* have benefited by what *might* have occurred *if* an antitrust violation had not taken place. Until the decisions below, no court had ever held that such speculation may substitute for proof of real injury.

The trial court sought to support its ruling by citing this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). But *Zenith* is no support for the proposition that guesses piled on guesses will satisfy Section 4. In *Zenith*, a patent pool sought to exclude Zenith from the Canadian radio market, and largely succeeded. This Court held that the fact of injury was adequately proven by evidence that, but for the pool's operation, Zenith

would have acquired a greater share of the Canadian market, paralleling its success in the American market. This evidence and this ruling are, we submit, altogether remote from the sheer speculation engaged in by the trial court in the case at bar.

There is, we recognize, a lack of surface appeal in any contention that an admitted (for the sake of argument) wrong should have no remedy. But "injury" is the requirement which the Congress wrote. And while the Congressional decision needs no support from us, it is perhaps appropriate to note that the standard is wholly reasonable. Our courts and, indeed, our legal system exist to deal with real problems, real injuries. These tasks are difficult enough, particularly in antitrust litigation. To require the courts to deal in what-might-have-been would not only add to their burdens; worse yet, it would cast them into disrespect by asking them to perform tasks beyond their competence or anyone's else.

There is a further deficiency in the ruling below on "injury." Not only was no Clayton Act "injury" proven, the reality is that any "injury" which the plaintiffs *might* have suffered was not proximately caused by the settlement, it resulted from plaintiffs' own inaction. Once the settlement was made, each throwster plaintiff had two choices: he could pay royalties to DMRC and Chavanoz, or he could refuse. If he refused, he presumably would have been sued for breach of contract or infringement, or he, himself, might have sued for a declaratory judgment. In either event, he would have asserted that the Chavanoz patents were invalid, and he would have won. The Chavanoz patents have, after all, been held invalid in the very case at bar, so it seems reasonable to conclude that the same result would have occurred in a hypothetical litigation between the same parties (by contrast with the unproven assumption

by the trial court that the Leesona patents, which have never been invalidated, would have fallen had Chavanoz and DMRC continued the litigation).

Thus any throwster who paid royalties to DMRC and Chavanoz after the settlement was not "injured" by the settlement—he was only accepting the consequences of his own free election to pay rather than fight.

Equally, any throwster might have picked up the cudgels which Chavanoz and DMRC laid down, and himself sued to invalidate the Leesona patents. If the beneficial consequences which the courts below assume would have resulted from continuation of the battle by Chavanoz and DMRC, they would have resulted equally from a throwster's fighting the good fight.

In consequence, any throwster who suffered from abandonment of the struggle by DMRC and Chavanoz had only himself to blame—he should have taken up the fight himself.

We ask this Court to rule, on this question, that "injury" for Section 4 purposes is a matter of fact to be proven, not assumed, and that wounds which are self-inflicted will not ground liability.

III.

Did the Courts below Deprive DMRC and Chavanoz of Due Process and a Fair Trial by Adjudging that They Were Liable for "Facilitating" Conduct by Leesona which Was Held Unlawful Only in a Litigation to which They Were Not Parties?

The facts on this question are these:

At about the same time that the throwsters here became involved in litigation with Chavanoz and DMRC, litigation also erupted between Leesona and numerous throwsters,

including many plaintiffs here, concerning the validity and infringement of Leesona's patents and whether the Leesona licensing program violated the antitrust laws. The Judicial Panel on Multidistrict Litigation consolidated the Leesona cases for pre-trial proceedings and assigned them to Judge Atkins of the Southern District of Florida. *In re Yarn Processing Patent Validity Litigation,* 341 F. Supp. 376 (1972).

One of the issues in the Leesona litigations involved the agreements by which Leesona licensed some companies to manufacture machines embodying the Leesona patents. The Court of Appeals for the Fifth Circuit affirmed Judge Atkins' award of summary judgment that these licenses constituted unlawful price-fixing agreements. Under the licenses, Leesona agreed to pay over to the licensed manufacturer one-third of any use royalties Leesona might collect from throwsters using that manufacturer's machines; the court reasoned that this agreement fixed a portion of the machine price to the throwsters and so was per se unlawful under the Sherman Act. *In re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (5th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977).

In the case now at bar, the trial court said (444 F. Supp. at 686, A70):

> "In addition to the foregoing antitrust violations DMRC and Chavanoz by means of their trade-restraining combination with Leesona have knowingly facilitated the combination between Leesona and other competing manufacturers of false twist machines pursuant to licensing agreements which have been held by the Fifth Circuit to constitute per se violations of Sections 1 and 2 of the Sherman Act, *In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (1976), and by aiding Leesona in the

furtherance of conduct thus held violative of the Sherman Act DMRC and Chavanoz have themselves violated the Act."

The trial court offered no further word of explanation.

This ruling leaves us utterly uncomprehending. Neither Chavanoz nor DMRC was a party to the litigation between Leesona and the throwsters. They had no role in or notice of that litigation. There was no finding in that litigation that DMRC or Chavanoz did anything improper. In fact, DMRC and Chavanoz repeatedly rejected Leesona's suggestion that the Leesona-Chavanoz/DMRC litigation be settled by their taking the standard Leesona manufacturer's license. (A374-76.)

And the issue of the lawfulness of Leesona's arrangement with other manufacturers was neither tried nor decided in *this* case. Rather, the courts below have held Chavanoz and DMRC liable here only because in *another* case there was an adjudication of unlawful conduct *by others.*

The constitutional principles ignored by the courts below are too plain to require discussion. Due process requires that we be given process and a fair opportunity to defend. We have had neither. The guarantee of a fair trial requires that there be either a trial or, if the facts are undisputed and need not be tried, at least an opportunity to be heard on issues which are stated. Again we have had neither.

We have searched for authority supporting the principles on which we rely. Perhaps because of their self-evident nature in our system of justice, we have found no authority precisely in point. But the plain words of the Constitution would seem persuasive.

And this Court's ruling in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 110 (1969) is surely close to the issue:

"It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry* v. *Lee,* 311 U.S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E.g., Pennoyer* v. *Neff,* 95 U.S. 714 (1878); *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, 418 (1957)."

The extraordinary ruling below is reminiscent of the clock which strikes thirteen times: the thirteenth chime is not only false in itself, it casts doubt upon the reliability of the entire mechanism.

IV.

(A) Assuming that the Sherman Act Is Violated by the Settlement of Patent Litigation which Permits Continuation of a Royalty Program, Does the Statute of Limitations Run From the Settlement, or Is a New Cause of Action Created Every Time a Royalty Payment Is Made?

The pertinent facts are few and undisputed: by April of 1964, all throwsters knew everything necessary to allege an antitrust claim attacking the Leesona settlement. Indeed, what they knew then was precisely what they knew in December 1969 when a claim attacking that settlement was first introduced: (a) the Leesona litigation was settled, a fact that the parties openly proclaimed in the trade press; (b) DMRC and Chavanoz had received an opinion of patent counsel in 1960 that the Leesona patents "should be held to be invalid"—DMRC had circulated this opinion throughout the industry; and (c) after the settlement, the DMRC/Chavanoz and Leesona patent licensing programs continued.

Knowing all they needed to know to bring suit attacking the settlement as a violation of the antitrust laws, the throwsters did not sue. And so, we submit, the passage of time from April 1964 to November 1969 operated to bar them from attacking the settlement, 15 U.S.C. § 15b.

The trial court held otherwise (444 F. Supp. at 692, A84):

> ". . . DMRC/Chavanoz and Leesona continued to maintain their respective licensing programs and to collect fixed production royalties from the plaintiffs up to and after the filing by plaintiffs of their antitrust actions herein, and these and other overt acts committed by the defendants within the four-year period preceding the institution of the actions created new causes of action in favor of the plaintiffs which are not time-barred."

The only "other overt acts" mentioned in this record are the three acts which the trial court viewed as instances of post-settlement "cooperation." We have demonstrated earlier, on the undisputed facts, that these acts were of not the slightest legal significance, pp. 18-19, *supra*.

Equally, while the trial court speaks of the collection of "fixed" production royalties, the context makes it clear that the court meant no such "fixing" as would result from a continuing agreement between Leesona and DMRC to sell at agreed-upon royalty levels; rather, the court was referring to the power in each licensor to fix its own royalty levels.*

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* Thus the trial court said (444 F. Supp. at 686, A68):

> "The settlement agreement, itself with its cross-covenants not to sue amounted in effect to the cross-licensing of the Chavanoz and Leesona patents by the two patent owners who effectively dominated the false twist industry, and this gave them the power to fix and maintain prices in the form of royalties which they consistently exercised thereafter."

The trial court's ruling comes down, then, to a holding that a new cause of action accrued every time a royalty payment was accepted, even though there was no ongoing agreement to charge agreed royalty rates. It is our position, by contrast, that if the settlement did violate the Sherman Act the violation was complete when the settlement was signed and the litigation ended, and the statute of limitations began to run at that time.

The trial court recognized that the cases in this area are scarcely in harmony, noting that "the defendants' position is not without some supporting authority." (444 F. Supp. at 692, A82.)

More accurately, we suggest, the Courts of Appeals are in flat conflict, and it is a conflict appropriate for resolution by this Court.

In *Northern Kentucky Tel. Co.* v. *Southern Bell T. & T. Co.*, 73 F.2d 333 (6th Cir.), *cert. denied,* 294 U.S. 719 (1934), the Sixth Circuit held that, even though damages may continue to result from a conspiracy to exclude plaintiff from obtaining a franchise, the statute of limitations runs from the last act of exclusion. Said the court, at 335:

> "If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute [of limitations] to put a period to the right to sue would be defeated."

The Fifth Circuit's decision in *City of El Paso* v. *Darbyshire Steel Co.*, 575 F.2d 521 (1978), *cert. denied,* 439 U.S. 1121 (1979), is likewise totally at odds with the ruling here. There, defendants were accused of conspiring to submit a collusive bid on structural steel to be used in the construction of a municipal facility. Affirming sum-

mary judgment for defendants, the Fifth Circuit held that the cause of action accrued when the conspirators signed the contract to supply steel at the rigged price—and that continuing receipt of payments for steel deliveries did not give rise to new causes of action.

By contrast, another panel of the Fifth Circuit, in *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian,* 549 F.2d 1029, *cert. denied,* 434 U.S. 859 (1977), reached an irreconcilably opposite result, holding that each collection of rent under a lease which was illegally tied to the purchase of a condominium gives rise to a new cause of action. The Seventh and Ninth Circuits seem to be aligned with the *Imperial Point* panel of the Fifth, see *Baker* v. *F&F Investment,* 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975).

In the case at bar, as we have seen, the courts below recognized this conflict of authority, but held that their ruling was required by this Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968). In our view, *Hanover Shoe* involved exactly what this case does *not* involve. There, a manufacturer of shoe machinery adopted a policy in 1912 of insisting on leasing, rather than selling, its machinery. The policy was continued down through the years. This Court held that a plaintiff which was compelled to lease from 1912 until 1955 could sue at the later date, since the continuation of the policy was "a continuing violation of the Sherman Act," *Id.* at 502, n.15.

In the case at bar we have no "continuing violation." The alleged wrong here—the settlement with Leesona—did not "continue"; it was accomplished and concluded when the settlement was signed and the litigation terminated. True, it might be said that the consequences of that act continued

down through the years (since no one else invalidated the Leesona patents), but the wrong, if wrong it was, was done in April 1964. That being so, actions begun in November 1969 and thereafter are barred.

This Court pointed out the basic policy underlying statutes of limitations in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U.S. 342, 348-9 (1944):

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

The case at bar provides graphic illustration of the need for statutes of repose. In the Leesona settlement, DMRC was represented by Norman Armitage, Chavanoz by Leo Soep. By the time this trial began, both had died.

There is, finally, an extraordinary unfairness in the throwsters' position that they were privileged to wait as long as they wished before bringing suit. For they will doubtless contend, if the damages issue is ever tried, that their damages are in some way related to the royalty payments they made to DMRC/Chavanoz. During the years they waited, those royalty payments multiplied almost thirty-fold, from $123,302 in 1964 to $3,329,303 in 1969. (444 F. Supp. at 687, n.20, A72.) The throwsters' position comes down, then, to arguing that they were entitled to wait and—by reason of the trebling of damages—to make a fortune by doing so.

Any construction of a statute of limitations which operates so to reward and encourage delay is, we submit, perverse.

(B) Is the Statute of Limitations Tolled Because Plaintiffs, Had They Sued Within the Statutory Period, Would Have Had Difficulty in Proving Their "Future Damages"?

As an alternative basis for its ruling on the statute of limitations, the trial court said (444 F. Supp. at 692-3, A84-85):

> "Additionally, defendants' plea of the statute of limitations must be rejected on the theory most recently recognized in this circuit in *Charlotte Telecasters [Inc.* v. *Jefferson Pilot,* 546 F.2d 570 (4th Cir. 1976)], that a cause of action does not accrue for purposes of the four-year statute of limitations as to future damages which are speculative and essentially unprovable. Because of the uncertainties in the false twist yarn industry in 1964 and 1965 and the enormous growth and change in character of false twist yarn consumption which occurred within the four years next preceding the filing of these suits it would have been impossible for the plaintiffs to prove with any reasonable degree of accuracy their future damages had these actions been instituted within four years from the 1964 settlement."

We are utterly at a loss tc understand this ruling. We agree that a cause of action for "future damages" does not accrue until the damages become reasonably measurable and provable—*Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 338-42 (1971).

But this case does not involve "future damages." If a throwster had sued a day or a year after the Leesona settlement, and his case had come to trial after a reasonable interval, and he had won, he would have been entitled to any damages actually suffered—and injunctive relief to bar future harm. He would not have been awarded any "future damages," for any future harm would have been avoided.

Zenith does not create, as we read it, any new cause of action for future damages which need not be suffered. We ask this Court, should it grant certiorari on the statute of limitations issue, to make this clear.

CONCLUSION

As we said at the outset, the rulings addressed by this petition are litigation-breeders. Unless reversed, they will make settlement of patent litigations virtually impossible and will add to the volume of antitrust litigation by dispensing with the requirements that the fact of injury be proven and that suit must be filed promptly. And so we suggest that this Court should grant certiorari.

We appreciate that this case comes to this Court with the damages issues still to be tried, and we are of course aware of the Court's disinclination to review incomplete cases. But three considerations suggest that review now rather than later is appropriate.

First, resolution now may not only avoid a lengthy damages trial—we have 37 separate actions consolidated here—but also may eliminate the need to try the many other cases which other throwsters have brought which were not here consolidated.

Second, resolution now is timely: trial of the damages issues will cast no light upon the questions now presented.

Finally, there is the fact that French enterprises, Chavanoz and ARCT-France, are involved. These companies

decided to enter the American market in false twist machines. They succeeded—and now, for their pains, they face an antitrust judgment. This judgment is likely to deter other foreign companies from entering the American market, and to impede the flow here of foreign technology. If the rulings below are to fall, as we submit they should, the earliest possible date would seem the best date.

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